Supreme Court, U. S.
FILED
SEP 3 - 1980
MICHAEL RODAK, JR., CLERK

No. 79-408

In the Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF MILWAUKEE, ET AL., PETITIONERS

v.

PEOPLE OF THE STATE OF ILLINOIS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will discuss the following question:

Whether the Clean Water Act, 33 U.S.C. 1251 *et seq.*, preempts the federal common law of nuisance regarding the pollution of interstate and navigable waters.

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Cases—Continued: Page

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Marine Protection, Research and Sanctuaries Act of 1972, Section 105(g)(5), 33 U.S.C. 1415(g)(5) 1

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Rivers and Harbors Act of 1910, 33 U.S.C. 421 26
Safe Drinking Water Act, Section 1449(e), 42 U.S.C. 300j-8(e) 1
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28 U.S.C. 1251(b)(3) 2
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28 U.S.C. 1391(b) 10
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Wisc. Admin. Code ch. NR 102, 2 Envir. Rep. (BNA) 951:1001 *et seq.* (1978) 8
33 C.F.R. (1972):
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Bryson & Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 Ecol. L.Q. 241 (1972) 29, 30, 31
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EPA, *Report To Congress On Control Of Combined Sewer Overflow in the United States* (1978) 30
Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964) 16, 18-19
Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 Colum. L. Rev. 1024 (1967) 18, 19
H.R. Conf. Rep. No. 95-830, 95th Cong., 1st Sess. (1977) 30
H.R. Rep. No. 92-911, 92 Cong., 2d Sess. (1972) 14, 23

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Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975) 18

Note, *Federal Common Law Remedies for the Abatement of Water Pollution*, 5 Ford. Urban L.J. 549(1977) 21

S. Rep. No. 92-414, 92d Cong., 1st Sess. (1971) 14, 23, 26-27

S. Rep. No. 95-370, 95th Cong., 1st Sess. (1977) 30

Water Pollution Control Legislation—1971: Hearings Before the House Comm. on Public Works, 92 Cong., 1st Sess. (1971) 24

Water Pollution Control Legislation: Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 92d Cong., 1st Sess., Pt. 1 (1971) 23-24, 27

Woods & Reed, *The Supreme Court and Interstate Environmental Quality: Some Notes on the* Wyandotte *Case*, 12 Ariz. L. Rev. 691 19

Zener, *The Federal Law of Water Pollution Control, reprinted in* Environmental Law Institute, *Federal Environmental Law* (ed. Dolgin & Guilbert 1974) 32

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45 Fed. Reg. (1980):

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INTEREST OF THE UNITED STATES

This case presents important questions concerning the interaction of the Clean Water Act, 33 U.S.C. 1251 *et seq.*,[1] and the federal common law of nuisance as applied to the pollution of interstate and navigable waters. See *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972). The federal government and its agencies are primarily responsible for the administration, interpretation, and enforcement of the Clean Water Act and various other legislation concerning the environment.[2] Pursuant to the Clean Water Act, the Environmental Protection Agency sets technology-based effluent limitations for both private dischargers and publicly-owned waste treatment works, and it finances a substantial percentage of the cost of constructing public sewage treatment facilities. See 33 U.S.C. (and Supp. II) 1281-1297, 1311-1314. The Administrator of EPA also has specific responsibilities with regard to interstate water pollution in general and the Great Lakes in particular. See 33 U.S.C. 1253, 1254(f), 1258.

Consistent with its overriding responsibility for the environment (*Sanitary District* v. *United States*, 266 U.S. 405, 425-426 (1925)), the United States itself has repeatedly relied upon the federal common law of nuisance in addition to various statutory remedies as part of its efforts

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[1] The Clean Water Act refers to the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566. See also Act of Dec. 28, 1973, Pub. L. No. 93-207, 87 Stat. 906; Act of Nov. 2, 1978, Pub. L. No. 95-576, 92 Stat. 2467.

[2] Many of these statutes contain savings clauses essentially identical to Section 505(e) of the Clean Water Act, 33 U.S.C. 1365(e), which is at issue in this case. See, *e.g.*, Section 304(e) of the Clean Air Act, 42 U.S.C. (Supp. II) 7604(e); Section 16(e) of the Deepwater Port Act of 1974, 33 U.S.C. 1515(e); Section 105(g)(5) of the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1415(g)(5); Section 12(e) of the Noise Control Act of 1972, 42 U.S.C. 4911(e); Section 7002(f) of the Solid Waste Disposal Act, 42 U.S.C. 6972(f); Section 1449(e) of the Safe Drinking Water Act, 42 U.S.C. (Supp. II) 300j-8(e); Section 520(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. II) 1270(e); and Section 20(c)(3) of the Toxic Substances Control Act, 15 U.S.C. 2619(c)(3).

to prevent and remedy the pollution of this country's natural resources. See, *e.g.*, *Illinois* v. *Outboard Marine Corp.*, 619 F.2d 623 (7th Cir. 1980), petition for cert. pending, No. 80-126; *United States* v. *Hooker Chemicals & Plastic Corp.*, No. 79-990 (W.D.N.Y., filed Dec. 20, 1979) (Love Canal litigation). See also *United States* v. *Nevada*, 412 U.S. 534, 538 (1973). Furthermore, given the limited resources of the Environmental Protection Agency and the Department of Justice, achieving the national goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters" (33 U.S.C. 1251(a)) depends in large measure on the continued effectiveness of state and private enforcement actions under appropriate federal statutes, state law, and the federal common law. Accordingly, resolution of the issues posed by this case will have a direct impact on the programmatic and enforcement interests of the United States.

STATEMENT

A. *Introduction and Background.*

1. The basic issue in this case is whether petitioners may be held liable under the federal common law of nuisance for discharging raw and inadequately treated sewage into the interstate and navigable waters of Lake Michigan. The litigation began in 1971, when Illinois sought leave of this Court to file an original complaint against petitioners and others for polluting Lake Michigan to the detriment and danger of the residents of Illinois. See *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972). The Court unanimously denied Illinois' motion. The Court concluded that the action against cities and local sewerage commissions in Wisconsin did not constitute a suit against that State within the purview of 28 U.S.C. 1251(a)(1) and that therefore the Court did not have exclusive, original jurisdiction over the controversy. See 406 U.S. at 93-98. And, because another forum was available, the Court declined the exercise of its permissive jurisdiction under 28 U.S.C. 1251(b)(3). 406 U.S. at 98-101, 108. In reaching that decision, however, the Court expressly held that the

suit would lie in an appropriate district court, as one "aris[ing] under the 'laws' of the United States" within 28 U.S.C. 1331(a). 406 U.S. at 99.[3]

The "law" invoked, the Court explained, was the federal common law, existing within the interstices of the numerous federal environmental protection statutes (*id.* at 101–104),[4] and derived from the well-established " 'interstate common law' " regarding disputes over interstate and navigable waters (*id.* at 105–106, quoting *Kansas* v. *Colorado*, 206 U.S. 46, 98 (1907)).[5] Focusing on the interaction between the federal common law and the relevant congressional enactments, the Court observed that although "various federal environmental protection statutes * * * may provide useful guidelines in fashioning [the federal common law]," federal courts applying the common law are not limited by either the remedies or the substantive protections contained in federal legislation. 406 U.S. at 103 & n.5.[6] The Court further commented (*id.* at 107):

> It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.

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[3] The Court thus expressly rejected the "contrary indication in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 n.3 [(1971)]." 406 U.S. at 102 n.3.

[4] The Court cited, *inter alia*, the Rivers and Harbors Act of 1899, 33 U.S.C. 407, and the Federal Water Pollution Control Act, 33 U.S.C. (1970 ed.) 1151 *et seq.* See pages 4–5, *infra*.

[5] The Court specifically cautioned, however, that "it is not only the character of the parties that requires us to apply federal law." 406 U.S. at 105 n.6. See *National Sea Clammers Ass'n* v. *City of New York*, 616 F.2d 1222, 1233–1235 (3d Cir. 1980), petition for cert. pending, No. 79–1711, 79–1754, 79–1760, and 80–12 (private parties may invoke federal common law).

[6] Likewise, the Court suggested that "[w]hile federal law governs, consideration of state standards may be relevant." 406 U.S. at 107 (footnote omitted).

2. At the time of the Court's decision in *Illinois* v. *City of Milwaukee*, the primary federal statutes concerning the problem of water pollution were the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. (1970 ed.) 1151 *et seq.*, and Section 13 of the Rivers and Harbors Act of 1899 ("the Refuse Act"), 33 U.S.C. 407. See *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 202–203 (1976). Under the FWPCA, ambient water quality standards, establishing permissible levels of pollution in particular bodies of water, constituted the principal pollution control mechanism. See 33 U.S.C. (1970 ed.) 1160(c).[7] The states were primarily responsible for developing these water quality standards and also an implementation plan meeting certain statutory criteria. See 33 U.S.C. (1970 ed.) 1160(c)(1), (c)(3). Where, however, the state either failed to establish a water quality standard or the standard was inadequate, the Administrator of the Environmental Protection Agency was required to promulgate appropriate water quality standards after consulting with various state authorities. See 33 U.S.C. (1970 ed.) 1160(c); *EPA* v. *Water Resources Control Board*, *supra*, 426 U.S. at 202 & n.4.

The original FWPCA also assigned the states the initial responsibility for enforcing water quality standards and abating water pollution. The states were free to establish enforcement procedures regarding intrastate pollution. See *EPA* v. *State Water Resources Control Board*, *supra*, 426 U.S. at 203. Moreover, the appropriate state authority (or, in some cases, the Administrator of the EPA) could initiate an enforcement conference among state, federal, and other interested parties, whenever a discharge into interstate waters either reduced the quality of such waters below the established standard or endangered the health or welfare of any person. See 33 U.S.C. (1970 ed.) 1160(a), (c)(5), and (d). If the conferees could not settle the

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[7]The FWPCA also directed the Administrator of EPA to conduct various research and development projects, including a study of the Great Lakes, and to help finance the construction of publicly owned sewage treatment works. See 33 U.S.C. (1970 ed.) 1155, 1158.

dispute and if the pollution discharges continued to "endanger[] the health or welfare of any person" six months after the discharger received notice of the violation, the United States was then authorized to bring suit to abate the pollution. See 33 U.S.C. (1970 ed.) 1160(a), (c)(5), (g); *Illinois* v. *City of Milwaukee*, *supra*, 406 U.S. at 103.[8]

In order to supplement the inconsistent efforts of the states under the FWPCA, federal officials also established the Refuse Act Permit Program ("RAPP") pursuant to the Refuse Act, 33 U.S.C. 407, which prohibits the discharge of any matter into navigable waters without a federal permit. See *EPA* v. *State Water Resources Control Board*, *supra*, 426 U.S. at 203; *Illinois* v. *City of Milwaukee*, *supra*, 406 U.S. at 102; 36 Fed. Reg. 6564 *et seq.* (1971). Under these regulations, every industrial discharger had to obtain a federal permit. RAPP permits, in turn, required the dischargers to comply with applicable water quality and hazardous waste standards. See 33 C.F.R. 209.131 (1972). RAPP did not, however, govern the discharges of public sewage treatment systems. 33 C.F.R. 209.131(d)(2)(ii) (1972).

3. In 1972, subsequent to the decision in *Illinois* v. *City of Milwaukee*, Congress substantially rewrote the FWPCA. See Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. 1251 *et seq.*; *EPA* v. *State Water Resources Control Board*, *supra*, 426 U.S. at 203–209. These 1972 amendments, now referred to as the Clean Water Act (see note 1, *supra*), declare that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. 1251(a)(1). *Costle* v. *Pacific Legal Foundation*, No. 78-1472 (Mar. 18, 1980), slip op. 2–3. To achieve this goal, Congress expanded the EPA re-

[8] If the discharge was endangering the health or welfare of persons only in the state where the discharge originated, then the federal suit was conditioned upon the written request of that state's governor. 33 U.S.C. (1970 ed.) 1160(g)(2).

search, demonstration, and funding programs contained in the original FWPCA[9] and established a new system of technology-based standards and permits, primarily aimed at achieving effluent limitations on all point sources, as well as achieving acceptable water quality standards. *EPA* v. *State Water Resources Control Board, supra*, 426 U.S. at 204.[10]

Thus, Section 301(b) of the Act, 33 U.S.C. (and Supp. II) 1311(b), directs the Administrator of EPA to set increasingly stringent effluent limitations for various categories of "point sources," including municipal dischargers.[11] See generally *E. I. duPont deNemours & Co.* v. *Train*, 430 U.S. 112 (1977); *National Crushed Stone Association* v. *EPA*, 601 F.2d 111 (4th Cir. 1979), cert. granted, No. 79-770 (Feb. 19, 1980). With regard to publicly owned treatment works, the Act requires application of "secondary treatment as defined by the Administrator"[12] no later than July 1, 1977 (33 U.S.C.

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[9]Title I of the Clean Water Act provides for various research and development programs. See 33 U.S.C. (and Supp. II) 1252-1265. Title II of the Act authorizes a massive construction grants program for municipal treatment facilities. 33 U.S.C. (and Supp. II) 1281-1297. Pursuant to a statutory formula involving relative population and sewage treatment needs, each state is allocated a certain share of federal funds. 33 U.S.C. (and Supp. II) 1285. Depending upon the priorities set by the state, EPA will fund 75% of the cost of each qualifying waste treatment project necessary to meet the requirements of the Act up to the total of the state's allocation. 33 U.S.C. (and Supp. II) 1281-1284, 1296. Certain innovative treatment works are eligible for 85% federal funding. 33 U.S.C. (Supp. II) 1282(a)(2). Projects to correct overflows from both separate sanitary sewer systems and combined storm and sanitary sewer systems are eligible for federal funding.

[10]See 33 U.S.C. (and Supp. II) 1311-1328, 1341-1345, 1364-1365, 1369-1371.

[11]A point source is a discrete outlet from which pollutants may be discharged, including pipes, sewers, and treatment plants. See 33 U.S.C. (Supp. II) 1362(14).

[12]Primary treatment involves screening and sedimentation to remove suspended organic and inorganic solids. Secondary treatment involves use of biological processes, primarily decomposition, with or without chemical disinfectants, to remove organic wastes.

1311(b)(1)(B), 1314(d)(1))[13] and "best practicable waste treatment technology over the life of the works" by July 1, 1983 (33 U.S.C. (and Supp. II) 1311(b)(2)(B), 1281(g)(2)(A)). Pursuant to Section 301(b)(1)(B), 33 U.S.C. 1311(b)(1)(B), the Administrator has issued regulations defining secondary treatment in terms of allowable limits of certain conventional pollutants.[14] No regulations exist, however, regarding the allowable discharge of viral and bacterial pathogens, fecal coliforms, or phosphorous and chlorine residuals. Moreover, because sewers and pipes that do not lead to a treatment facility are not considered publicly owned treatment works for purposes of Section 301 (see 40 C.F.R. 122.3(bb); 45 Fed. Reg. 33423 (1980) (to be codified at 40 C.F.R. 122.3)), overflows from combined storm and sanitary sewers are not subject to the secondary treatment and best practicable waste treatment requirements.[15]

The effluent limitations constitute the minimum level of pollution control under the Act. See 33 U.S.C. 1311(b)(1)(C); 45 Fed. Reg. 33512 (1980) (to be codified at 40 C.F.R. 125.3). Section 303, 33 U.S.C. 1313, of the Act preserved any existing water quality standards issued under the original FWPCA and directs each state to promulgate water quality standards governing all intra-

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[13] On December 27, 1977, Congress amended the Act to permit the Administrator to grant extensions of this deadline through, but no later than, July 1, 1983, where compliance has been delayed by construction problems or lack of federal financial assistance. Clean Water Act of 1977, Pub. L. No. 95-217, Section 45, 91 Stat. 1584, 33 U.S.C. (Supp. II) 1311(i); *Costle* v. *Pacific Legal Foundation*, *supra*, slip op. 4 n.4. The amendments also permit limited modification of the secondary treatment requirements for publicly owned treatment plants that discharge into marine waters. Section 44, 91 Stat. 1584, 33 U.S.C. (Supp. II) 1311(h).

[14] These regulations focus on five-day biochemical oxygen demand, suspended solids, and pH. 40 C.F.R. 133.102.

[15] Such overflows must be covered by a permit and must comply with Sections 301(b)(1)(A) and 301(b)(2). No specific effluent limitation regulation has been issued with regard to combined sewer overflows, which must therefore be considered on a case-by-case basis. 40 C.F.R. 125.3(c)(2). See also 40 C.F.R. 133.103(a).

state waters and to review its water quality standards at least every three years. 33 U.S.C. 1313(a), (c), (d), (e).[16] The states may also impose more stringent effluent limitations or other forms of pollution control as a matter of state law. 33 U.S.C. 1370. Finally, under Section 302 of the Act, the Administrator may require more stringent effluent limitations for particular point sources in order to protect public water supplies, agricultural and industrial uses, shellfish, fish and wildlife, and recreational uses, but only if such additional limitations are cost justified. 33 U.S.C. 1312(a), (b).[17]

Section 402 of the Act, 33 U.S.C. (and Supp. II) 1342, establishes the National Pollutant Discharge Elimination System ("NPDES"), which is designed "to transform generally applicable effluent limitations and other standards—including those based on water quality—into the obligations (including a timetable for compliance) of the individual discharger." *EPA* v. *State Water Resources Control Board, supra,* 426 U.S. at 205.[18] It is unlawful for any person to discharge pollutants into the Nation's waters without an NPDES permit, and such permits incorporate effluent limitations, water quality standards, and other applicable requirements. See *ibid.*; *Crown Simpson Pulp Co.* v. *Costle,* No. 79-797 (Mar. 17, 1980), slip op. 1; *Costle* v. *Pacific Legal Foundation, supra,* slip op. 3; 33

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[16] All proposed water quality standards are subject to EPA review, and EPA may issue applicable water quality regulations whenever a state either fails to promulgate such standards or its proposed standards do not satisfy statutory requirements. 33 U.S.C. 1313(a), (b), and (c).

Illinois water quality standards governing its portion of Lake Michigan are more stringent than the comparable Wisconsin water quality standards (see Pet. App. A-38 to A-39). Compare Ill. Water Pollution Control Board Rules and Regulations ch. 3, 1 Envir. Rep. (BNA) 766:0501 *et seq.* (1979) with Wisc. Admin. Code ch. NR 102, 2 Envir. Rep. (BNA) 951:1001 *et seq. (1978).*

[17] The Administrator has never modified an effluent limitation pursuant to Section 302, 33 U.S C. 1312.

[18] The NPDES program replaced the RAPP system. 33 U.S.C. (Supp. II) 1342(a)(5).

U.S.C. (and Supp. II) 1311, 1342. NPDES permits are issued by the EPA or, in those covered jurisdictions in which EPA has authorized a state agency to administer the NPDES program,[19] by the state agency subject to EPA review. See 33 U.S.C. (and Supp. II) 1342(a)-(d); *Crown Simpson Pulp Co.* v. *Costle, supra,* slip op. 1-2, 4; *E.I. duPont deNemours & Co.* v. *Train, supra,* 430 U.S. at 119-120 & n.7; *EPA* v. *State Water Resources Control Board, supra,* 426 U.S. at 206-208.[20] In accordance with the Act and EPA's regulations, all interested parties, including a state whose waters may be affected by the discharges in question, are entitled to notice and an opportunity for a hearing regarding the issuance of a permit. See *Costle* v. *Pacific Legal Foundation, supra*; 33 U.S.C. 1342(a)(1), (b)(3)-(b)(5), (j); 40 C.F.R. Parts 124-125; 45 Fed. Reg. 33484 *et seq.* (1980).[21]

The Clean Water Act also strengthens the enforcement provisions of the original FWPCA. Section 309(c) imposes criminal penalties for willful or negligent violations of the Act (33 U.S.C. (and Supp. II) 1319(c)), and authorizes the Administrator to bring civil enforcement actions "for appropriate relief, including a permanent or temporary injunction" and for limited civil penalties. 33 U.S.C. (and Supp. II) 1319(a), (b), (d). So-called "permitting states" and adversely affected private persons may also bring enforcement actions, subject to specific statutory conditions. 33 U.S.C. (and Supp. II) 1319(a)(1), 1365. Section 505(e)

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[19] Thirty-two states and covered territories, including Wisconsin, operate their own NPDES program.

[20] EPA decisions issuing or denying permits (or failing to approve state-issued permits) are subject to limited judicial review in the courts of appeals. 33 U.S.C. 1369(b)(1)(F); see *Crown Simpson Pulp Co.* v. *Costle, supra.*

[21] Section 402(b)(5) provides that an affected state may submit written recommendations to the Administrator and the permitting state and that, if the permitting state does not accept such recommendations, it must notify the affected state and the Administrator of its reasons for rejecting the recommendations. 33 U.S.C. 1342(b)(5). Thereafter, the Administrator may refuse to approve the permit. 33 U.S.C. (Supp. II) 1342(d)(2)(A).

provides, however, that the statutory right of action does not "restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief * * *." 33 U.S.C. 1365(e).

B. *The Proceedings Below.*

1. On May 19, 1972, in accordance with this Court's invitation in *Illinois* v. *City of Milwaukee*, *supra*, the State of Illinois filed suit in the United States District Court for the Northern District of Illinois, claiming that petitioners' discharge of massive amounts of untreated and undertreated sewage into Lake Michigan constituted a federal common law nuisance.[22] It was alleged that petitioners' discharges polluted the Illinois portion of Lake Michigan and thereby threatened the health and welfare of Illinois residents and accelerated eutrophication of the lake. Subsequently, the State of Michigan intervened in this suit as a plaintiff solely with regard to the issue of eutrophication (Pet. App. A-2 to A-3).

Prior to trial, petitioners moved to dismiss the complaint on jurisdictional and venue grounds. The district court denied this motion, concluding that service of respondents was proper under the Illinois "long-arm" statute and that venue lay in the Northern District of Illinois under 28 U.S.C. 1391(b). See Pet. App. H. Thereafter, based on the 1972 amendments to the FWPCA (see pages 5-9, *supra*), petitioners again moved to dismiss the complaint, arguing that the new Clean Water Act preempted the federal common law. The district court denied this motion as well (Pet. App. G). The court pointed out (Pet. App. G-5) that Sections 101(b) and 510 of the Act evidence Congress' intent to preserve the "rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. (Supp. II) 1251(b); see 33 U.S.C. 1370. The court further ob-

[22] Respondent also claimed that respondents' pollution violated the Illinois Environmental Protection Act, Ill. Ann. Stat. ch. 111-½, § 1001 *et seq.* (Smith-Hurd 1977), and state common law.

served that where Congress had intended to preempt other law it had done so explicitly (citing 33 U.S.C. 1322(f)(1)) and that "[n]owhere do the 1972 amendments express any intention of eliminating the rights of the states to seek common law nuisance protection" (Pet. App. G-5).

Following a four-month trial, the district court made extensive oral findings about the discharge of raw sewage into Lake Michigan from both petitioners' combined storm and sanitary sewer system and its separate sanitary sewer system, and the discharge of inadequately treated sewage from petitioners' two sewage treatment plants (Pet. App. F).[23] Applying a clear and convincing burden of proof (*id.* at F-2 to F-3, F-14), the court found that petitioners' sewer systems discharge disease-causing bacteria and viruses into Lake Michigan and that as a result of the currents in Lake Michigan, these pathogens reach Illinois waters in substantial numbers as often as 12 times per year or more (*id.* at F-6 to F-11). The court further concluded that these pathogens can infect bathers at Illinois beaches and contaminate the drinking water that is extracted from Lake Michigan (*id.* at F-10 to F-12), and thus "constitute[] a health hazard of serious magnitude to the residents of the State of Illinois" (*id.* at F-15). In addition, the court found that the phosphorous and other nutrients contained in the sewage are accelerating the eutrophication of Lake Michigan (*id.* at F-15 to F-23).

Based on these findings, the court held that petitioners' discharge of raw and improperly treated sewage into Lake Michigan is a nuisance as a matter of federal common law.[24] Accordingly, the district court granted respondents'

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[23] As to the latter, the district court specifically found that petitioners were not complying with EPA regulations and that, in any event, compliance with EPA secondary treatment standards "would still result in the discharge of staggering numbers of pathogens to Lake Michigan" (Pet. App. F-6).

[24] The district court also held petitioners liable under Illinois statutory and common law (Pet. App. F-2). The court of appeals did not address these alternative bases for relief (Pet. App. A-46). These claims are a subject of respondent Illinois' cross-petition. See *People of*

request for injunctive relief. In particular, the court ordered petitioners, pursuant to an agreed timetable, to cease discharging raw sewage into the lake. The order requires petitioners to construct substantial sewage treatment and storage facilities in addition to the facilities that petitioners must in any event build to comply with existing Clean Water Act regulations. Furthermore, the district court's order mandated that petitioners' sewage treatment plants meet certain effluent limitations more stringent than the applicable Clean Water Act standards. See Pet. App. D, F-24 to F-29.

2. On appeal, the court of appeals affirmed in part and reversed in part. The court first rejected petitioners' jurisdictional and venue claims (Pet. App. A-4 to A-6). After carefully examining the evolution of the Clean Water Act (Pet. App. A-6 to A-17), the court also rejected petitioners' claims that the Clean Water Act had preempted the federal common law of nuisance and that, in any event, compliance with Clean Water Act standards constitutes an absolute defense to respondents' common law claims (*id.* at A-17 to A-20). The court explained that Sections 510 and 511 of the Act, 33 U.S.C. 1370–1371, evidence congressional intent to permit "establishment of more stringent limitations" than those imposed by the Act itself, and that Section 505(e), 33 U.S.C. 1365(e), explicitly preserves all common law rights of action (Pet. App. A-17 to A-18).

The court observed, however, that the policies and even the standards of the Clean Water Act should guide a court in applying the federal common law of nuisance (*id.* at A-20 to A-23). In accordance with this principle and based on an exhaustive examination of the trial record, the court of appeals agreed with the district court that petitioners' raw sewage discharges both constitute a hazard to the public health and substantially contribute to eutrophication, and are thus subject to abatement (*id.* at A-26 to

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the State of Illinois v. *City of Milwaukee*, cross-petition for cert. pending, No. 79-571.

A-39, B-2 to B-27). But the court of appeals reversed insofar as the district court had imposed effluent standards on petitioners' treatment plants more stringent than those required under the Clean Water Act (*id.* at A-40 to A-48, B-27 to B-32). See *People of the State of Illinois* v. *City of Milwaukee*, cross-petition for cert. pending, No. 79-571.[25]

SUMMARY OF ARGUMENT

In *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), this Court unanimously concluded that pollution of interstate or navigable waters gives rise to an action under the federal common law of nuisance, which survives and complements the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. (1970 ed.) 1151 *et seq.*, and the other existing federal legislation concerning pollution control. The Court noted, however, "that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance." 406 U.S. at 107. The question primarily posed by this case is whether the subsequent amendments to the FWPCA, now commonly referred to as the Clean Water Act, have precluded or limited federal common law actions to abate water pollution. We submit that the court of appeals correctly concluded that nothing in the language, legislative history, or structure of the Clean Water Act suggests that Congress intended to preempt the long-standing federal common law regarding interstate water disputes.

Indeed, the language of the Act unambiguously demonstrates that Congress intended to preserve, not preempt, the federal common law. First, where Congress sought to preempt other laws, it did so expressly. See 33 U.S.C.

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[25] The United States takes no position as to whether the district court's order, as modified by the court of appeals, constitutes a proper remedy under the federal common law of nuisance. EPA and petitioners are currently disputing whether and to what extent federal funds will be available to defray the cost of the sewage treatment works ordered by the courts below. See note 9, *supra*.

1322(f)(1). No such provision governs this case. More important, Section 505(e) provides that a state's rights under the Act do not "restrict any right which [the state] may have under any statute or *common law* to seek enforcement of any effluent standard or limitation or *to seek any other relief* * * *." 33 U.S.C. 1365(e) (emphasis supplied). Similarly, Sections 101(b), 510, and 511 of the Act make clear that, pursuant to any other law, both state and federal authorities may impose and enforce more stringent levels of pollution control than those required by the Clean Water Act. See 33 U.S.C. (and Supp. II) 1251(b), 1370, 1371. Accordingly, the courts have uniformly concluded that the Clean Water Act does not preempt the federal common law of nuisance regarding interstate pollution.

The legislative history of the Act also shows that passage of the Clean Water Act did not affect "the right of persons (or class of persons) to seek enforcement or other relief under any statute or common law * * *." H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 134 (1972). For example, the Senate Report accompanying the Act states (S. Rep. No. 92-414, 92d Cong., 1st Sess. 81 (1971)):

> It should be noted, however, that [Section 505(e)] would specifically preserve any rights or remedies under any other law. * * * Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.

The legislative debates and hearings also reflect Congress' considered view that the Clean Water Act would not affect or hinder any suit arising under the federal common law of nuisance.

Seeking to circumvent the plain meaning and legislative history of the Act, petitioners argue that preservation of the common law will frustrate the congressional design. But Congress itself contemplated that the federal common law would supplement the rights and remedies created by the Clean Water Act. Moreover, the Environmental Protection Agency, which is primarily responsible for administering and enforcing the Act, has long viewed the federal common law as an essential complement to the

Act. EPA's judgment that suits under the federal common law of nuisance will advance rather than impede the policies and goals of the Act is entitled to substantial deference.

In any event, petitioners' claims regarding the conflict between the common law and the Act are unfounded. Petitioners suggest that the imposition of more stringent pollution control requirements under the common law will disrupt the uniform level of effluent limitations set pursuant to Section 301 of the Act, 33 U.S.C. (and Supp. II) 1311. But the Act makes clear that the effluent limitations set by EPA are only a uniform national *minimum* level of pollution control, and that there is no statutory bar to still higher standards of pollution control. See 33 U.S.C. 1311(b)(1)(C), 1370, 1371. Furthermore, the equitable principles that inform the federal common law of nuisance, should ensure that the relief granted by the federal courts will neither be untimely nor disproportionate to the harm caused by a defendant's discharges.

Finally, petitioners erroneously contend that there is no longer a need for the federal common law of nuisance. To the contrary, this case highlights the critical functions that the common law continues to serve. Congress has recognized that the Act and EPA's regulations fail to address adequately the problems of combined sewer overflows—precisely the source of raw sewage at issue here. See 33 U.S.C. (Supp. II) 1375(c) (requiring EPA to submit a report on "the status of combined sewer overflows in municipal treatment works operations"). Likewise, EPA's regulations regarding secondary sewage treatment do not govern the discharge of the pollutants, such as pathogens, fecal coliforms, and phosphorous, that give rise to respondents' suit. And although one state may set strict standards with regard to the permissible level of pollution in its waters, it has no authority under the Act either to compel another state that shares the same waters to adopt or impose equally high standards or to remedy the consequences of past pollution not regulated by the Act. Accordingly, in the absence of a federal common law remedy,

a state may well be powerless to protect the health and safety of its citizens and to preserve the quality of its waters.

ARGUMENT

THE CLEAN WATER ACT NEITHER PREEMPTS NOR MARKS THE OUTER BOUNDS OF THE FEDERAL COMMON LAW OF NUISANCE REGARDING INTERSTATE WATER POLLUTION

A. Introduction: The Federal Common Law Of Nuisance

1. Although "there is no federal general common law" (*Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938)),[26] this Court has long recognized that there is an "interstate common law" regarding disputes over the use, ownership, and pollution of interstate and navigable waters. *Kansas* v. *Colorado*, 206 U.S. 46, 98 (1907). See, *e.g.*, *Missouri* v. *Illinois*, 180 U.S. 208, 241–245 (1901); *Kansas* v. *Colorado*, 185 U.S. 125, 146–147 (1902); *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907); *Sanitary District* v. *United States*, 266 U.S. 405, 425–426 (1925); *Connecticut* v. *Massachusetts*, 282 U.S. 660, 669–671 (1931); *New Jersey* v. *New York*, 283 U.S. 336, 342–343 (1931); *United States* v. *Nevada*, 412 U.S. 534, 538–539 (1973); *Vermont* v. *New York*, 417 U.S. 270, 275 n.5 (1974). Indeed, in *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), which was decided the same day as *Erie R.R.* and which was also written by Mr. Justice Brandeis, the Court expressly confirmed that the apportionment of interstate waters ordinarily involves "a question of 'federal common law.' " And, of course, in *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 99 (1972)—a case arising out of the same controversy now before the Court—, the Court unanimously concluded that "pollution

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[26] See generally Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964).

of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of [28 U.S.C.] 1331(a)."

The decision in *Illinois* v. *City of Milwaukee* was premised on three interrelated considerations. First, the Court surveyed the substantial federal legislation concerning this Nation's waters and concluded that "it is federal, not state, law that in the end controls the pollution of interstate or navigable waters." 406 U.S. at 102. Because of the overriding federal interest reflected in various congressional enactments, the Court concluded that it was appropriate for the federal courts to fashion federal law using the federal environmental protection statutes as guidelines (*id.* at 103 & n.5) and to provide federal remedies even though "not within the precise scope of remedies prescribed by Congress" (*id.* at 103). In short, the field of water pollution "is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law." *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176 (1942). See also *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973); *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 393–403 (1970); *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, 201–203 (1967); *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 491–492 (1960); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456–457 (1957).

Moreover, the Court recognized (406 U.S. at 104–105) that the federal common law of nuisance has constitutional underpinnings arising out of the federal system. Each state retains a quasi-sovereign interest over its natural resources such as air and water and may act to protect such resources even from pollution emanating from another state. See, *e.g.*, *Georgia* v. *Tennessee Copper Co.*, *supra*, 206 U.S. at 237–238; *Kansas* v. *Colorado*, *supra*, 185 U.S. at 142; *Missouri* v. *Illinois*, *supra*, 180 U.S. at 241. In entering the Union, however, the states surrendered their independent "[d]iplomatic powers and the right to make

war" as means of settling interstate disputes. *Ibid.* See, *e.g.*, *Georgia* v. *Tennessee Copper Co.*, *supra*, 206 U.S. at 237; *Missouri* v. *Illinois*, 200 U.S. 496, 520–521 (1906); U.S. Const. Art. I, Section 10, cls. 1, 3. Nor can the victim state generally enforce its own law beyond its borders. Cf. *Nevada* v. *Hall*, 440 U.S. 410 (1979). Yet, its sovereign rights ought not be circumscribed by the law of its neighbor state, which may be inadequate. Accordingly, federal law must perforce serve as a basis for resolving interstate pollution disputes. See, *e.g.*, U.S. Const. Art. III, Sections 1, 2; *Nebraska* v. *Wyoming*, 325 U.S. 589, 608 (1945); *New Jersey* v. *New York*, *supra*, 283 U.S. at 342–343; *North Dakota* v. *Minnesota*, 263 U.S. 365, 372–374 (1923); *Georgia* v. *Tennessee Copper Co.*, *supra*; *Texas* v. *Pankey*, 441 F.2d 236, 240–242 (10th Cir. 1971); Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 Colum. L. Rev. 1024, 1030–1032 (1967); Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 13–14 & n.72 (1975).[27]

The decision in *Illinois* v. *City of Milwaukee* makes clear, however, that "it is not only the character of the parties that requires us to apply federal law [but also] * * * an overriding federal interest * * * in the pollution of a body of water such as Lake Michigan bounded, as it is, by four States." 406 U.S. at 105 n.6. As Judge Friendly has explained, "the Constitution can well be deemed to require that the federal courts should fashion law when the interstate nature of a controversy makes it inappropriate that the law of either state should govern." Friendly, *In*

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[27] Similarly, a suit by the federal government to abate pollution of interstate or navigable waters of the United States necessarily involves application of federal law. See, *e.g.*, *United States* v. *Nevada*, 412 U.S. 534, 538–539 (1973); *Sanitary District* v. *United States*, 266 U.S. 405, 425–426 (1925); *Illinois* v. *Outboard Marine Corp.*, 619 F.2d 623 (7th Cir. 1980), petition for cert. pending, No. 80–126; *United States* v. *Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975); *United States* v. *Atlantic-Richfield Co.*, 478 F. Supp. 1215, 1218–1220 (D. Mont. 1979). See also *Kaiser Aetna* v. *United States*, 444 U.S. 164, 173 (1979).

Praise of Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 408 n.119 (1964). In other words, regardless of the identity of the litigants, resolution of a dispute over interstate or navigable waters requires application of uniform federal law rather than inconsistent state law. See, *e.g.*, *Vermont* v. *New York*, *supra*, 417 U.S. at 275 n.5; *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426–427 (1964); *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, *supra*, 304 U.S. at 110–111; Hill, *Constitutional Preemption*, *supra*, 67 Colum. L.Rev. at 1074–1076; Woods and Reed, *The Supreme Court and Interstate Environmental Quality: Some Notes on the* Wyandotte *Case*, 12 Ariz. L.Rev. 691, 711–714 (1970).

2. Petitioners do not contest the essential conclusion of the Court in *Illinois* v. *City of Milwaukee* that federal common law governs public nuisance actions regarding the pollution of interstate or navigable waters. Without question, petitioners' continuing discharges of raw sewage into Lake Michigan trench upon the quasi-sovereign interests of several states and threaten the quality of an interstate body of water. Moreover, insofar as the federal common law is affected by congressional legislation,[28] the evolution of the FPWCA and Clean Water Act described above (pages 4–10, *supra*) clearly reflects increased federal concern and involvement in "the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). See also, *e.g.*, 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 178, 248, 250–251, 332, 343–348, 355–356, 359, 451–453, 516–517, 664, 716, 737, 1422–1428 (Comm. Print 1973).

Rather, petitioners contend that the Clean Water Act preempts federal common law nuisance actions. To be sure, Congress may abrogate or supplant well-settled common law rights and duties. See, *e.g.*, *Carlson* v. *Green*, No. 78–1261 (Apr. 22, 1980), slip op. 4; *Illinois* v.

[28]The federal courts applied the "interstate common law" of public nuisance long before Congress enacted the original FWPCA in 1948. See, *e.g.*, *Kansas* v. *Colorado*, *supra*, 206 U.S. at 98; *Georgia* v. *Tennessee Copper Co.*, *supra*.

City of Milwaukee, supra 406 U.S. at 107; *Arizona* v. *California*, 373 U.S. 546, 564–566 (1963); *New Jersey* v. *New York, supra*, 283 U.S. at 348. But petitioners do not suggest that the Clean Water Act expressly precludes common law relief. In the absence of such an explicit congressional declaration, this Court has repeatedly concluded that "a common-law right * * * is not to be abrogated 'unless it be found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory." *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298 (1976), quoting *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907). See, *e.g.*, *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952). See also *Carlson* v. *Green, supra*, slip op. 4.[29]

Here, the presumption against abrogation of common law rights has special force because, as in *Nader* v. *Allegheny Airlines, Inc., supra*, 426 U.S. at 299, there is no "irreconcilable conflict between the statutory scheme and the persistence of common law remedies." To the contrary, common law nuisance actions are expressly preserved by the Act (Point B, *infra*) and serve to supplement the statutory scheme, particularly in the area of municipal discharges into interstate waters (Point C, *infra*). Thus, the court of appeals correctly concluded that the Clean Water Act does not preempt the federal common law of nuisance regarding the pollution of interstate waters (Pet. App. A–17 to A–23). Accord, *Illinois* v. *Outboard Marine Corp.*, 619 F.2d 623, 626 n.13 (7th Cir. 1980), petition for cert. pending, No. 80–126; *National Sea Clammers Association* v. *City of New York*, 616 F.2d 1222, 1233 n.31 (3d Cir. 1980), petitions for cert pending, Nos. 79–1711, 79–1754, 79–1760, and 80–12; *California*

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[29] *Carlson* involved the question whether the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, preempts constitutional common law actions. See *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). Similarly, respondents' federal common law actions have a constitutional basis. See pages 17–19, *supra*.

Tahoe Regional Planning Agency v. *Jennings*, 594 F.2d 181, 193 (9th Cir.), cert. denied, 444 U.S. 864 (1979); *Committee for Jones Falls Sewage System* v. *Train*, 539 F.2d 1006, 1008–1009 (4th Cir. 1976); *United States* v. *Ira S. Bushey & Sons, Inc.*, 363 F. Supp. 110, 119–120 (D. Vt.), aff'd, 487 F.2d 1393 (2d Cir. 1973), cert. denied, 417 U.S. 976 (1974); *United States* v. *Atlantic-Richfield Co.*, 478 F. Supp. 1215, 1218–1220 (D. Mont. 1979).

B. The Clean Water Act Expressly Preserves Independent Federal Common Law Rights And Remedies Regarding The Abatement Of Water Pollution

1. The language of the Clean Water Act makes clear that Congress intended to preserve the federal common law of nuisance. Section 505 of the Act, 33 U.S.C. 1365, authorizes citizen suits, including suits by states, to enforce the terms and requirements of the Act. Section 505(e) unambiguously provides, however, that "[n]othing in this section shall restrict *any right* which *any person* (or class of persons) may have under any statute or *common law* to seek enforcement of any effluent standard or limitation or to seek *any other relief* (including relief against the Administrator or a State agency)." 33 U.S.C. 1365(e) (emphasis supplied). Since the Act specifically defines person to include a "State, municipality, commission, or political subdivision of a State, or any interstate body" (33 U.S.C. 1362(5)), it seems indisputable that the Act does not preclude respondents from suing petitioners under the pre-existing federal common law of nuisance. See, *e.g.*, *National Sea Clammers Association* v. *City of New York*, *supra*, 616 F.2d at 1233 n.31; *California Tahoe Regional Planning Agency* v. *Jennings*, *supra*, 594 F.2d at 193; Note, *Federal Common Law Remedies for the Abatement of Water Pollution*, 5 Ford. Urban L.J. 549, 557 (1977).

Other sections of the Act also support the court of appeals' conclusion that Congress did not intend to preempt

the federal common law of nuisance as it applies to this case. First, where Congress sought to preempt the application of other laws, it did so expressly. See Section 312(f)(1), 33 U.S.C. 1322(f)(1). No such explicit declaration governs a municipality's discharge of raw sewage into interstate waters, and particularly in light of the express language of Section 505(e), none should be lightly implied. See *Nader* v. *Allegheny Airlines, Inc.*, *supra*, 426 U.S. at 298–299; *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, *supra*, 204 U.S. at 437.[30]

Moreover, Sections 510 and 511 of the Act establish that, except as otherwise provided by the Act, neither a state nor any federal officer or agency is precluded from promulgating or enforcing more stringent pollution controls and standards than those required by the Act. 33 U.S.C. 1370 and 1371. See also 33 U.S.C. (Supp. II) 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution"). In other words, all dischargers must meet the minimum level of effluent control set by EPA pursuant to the Act, and may, in addition, be required to meet more stringent standards established by other statutes or common law. See, *e.g.*, *Illinois* v. *Outboard Marine Corp.*, *supra*, 619 F.2d at 630; *United States Steel Corp.* v. *Train*, 556 F.2d 822 (7th Cir. 1977); *Homestake Mining Co.* v. *EPA*, 477 F. Supp. 1279, 1283–1284 (D. S.Dak. 1979).

In sum, the language of the Act offers no support for petitioners' preemption argument. To the contrary, it is

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[30] Petitioners contend (Br. 33–36) that because the Clean Water Act is sufficiently comprehensive and complete, there is no longer a need for a federal common law. In short, petitioners suggest that the Clean Water Act fully occupies the field of water pollution control. However, as we demonstrate in Point C, *infra*, the common law continues to play a vital role in this area. More important, since preemption is essentially a question of congressional intent, the express language of the Act should be deemed controlling, unless application of the common law would, in a particular case, utterly defeat the purposes of the Act. See, *e.g.*, *Nader* v. *Allegheny Airlines, Inc.*, *supra*; *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, *supra*.

apparent that Congress expressly contemplated that the federal government, the states, and even private citizens could bring suits under the federal common law or other laws to abate water pollution regardless of whether the particular discharger was in compliance with the effluent limitations and other regulations of the Act.

2. The legislative history of the Clean Water Act also refutes petitioners' preemption claim. The Senate Report accompanying the 1972 Act describes the congressional intent informing Section 505(e):

> It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.

S. Rep. No. 92-414, 92d Cong., 1st Sess. 81 (1971), *reprinted in 2 A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 1499 (Comm. Print 1973) (hereinafter "Leg. Hist.").[31] Likewise, the House Report explains that Section 505(e) "provides that the right of persons (or class of persons) to seek enforcement or other relief under any statute or *common law* is not affected." H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 134 (1972) (emphasis supplied), *reprinted in* 1 Leg. Hist. 821.

In addition, the contemporaneous legislative debates and hearings demonstrate that Congress specifically focused on the federal "common law of water pollution abatement" (1 Leg. Hist. 688) and concluded that enactment of the Clean Water Act would not limit or preclude such suits. See, *e.g.*, 1 Leg. Hist. 191-194, 211, 676; *Water Pollution Control Legislation: Hearings Before the*

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[31] Petitioners rely (Br. 41) on another passage from the Senate Report regarding Section 505. See S. Rep. No. 92-414, *supra*, at 79, reprinted at 2 Leg. Hist. 1497. But that statement refers only to the scope of citizen suits authorized by Section 505 and not to independent common law actions. In such enforcement suits, the courts may not reexamine the standards set by EPA.

Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 92d Cong., 1st Sess., Pt. 1, 643, 672, 687, 718, 720, 731 755 (1971) (hereinafter "Senate Hearings") ; *Water Pollution Control Legislation—1971: Hearings Before the House Comm. on Public Works*, 92d Cong., 1st Sess. 1028, 1109-1110, 1530, 1536, 1748 (1971). And, as evidenced by Section 505(e), Congress considered and rejected the alternative of preempting the common law and making citizen suits under Section 505 "the sole and exclusive method which citizens may participate in in this kind of litigation * * *." *Senate Hearings*, Pt. 1, at 724. See *id.* at 730-731, 1071-1077.

For example, in a colloquy on the floor of the Senate, Senator Griffin inquired whether passage of the Clean Water Act would affect in any way the then ongoing Reserve Mining Company litigation. 1 Leg. Hist. 191. The Senator specifically noted that this suit, which concerned the discharge of taconite tailings into Lake Superior, was based in part on the federal common law of "public nuisance" (*ibid.*). See *Reserve Mining Co.* v. *EPA*, 514 F.2d 492, 501 (8th Cir. 1975). Consistent with the position taken by EPA, Senators Muskie[32] and Hart replied that the Clean Water Act would not affect or hinder "the suit now pending against the Reserve Mining Co., under the Refuse Act of 1899 * * * [,] the existing Federal Water Pollution Control Act or *other law*." 1 Leg. Hist. 211 (emphasis supplied). See 1 Leg. Hist. 191-194; Senate Hearings, Pt. 1, at 1017-1020. See also 1 Leg. Hist. at 248 (similar colloquy between Reps. Dingell and Wright).

3. In striking contrast to their preemption argument, petitioners also contend that Section 505 provides for federal common law actions, but that Section 402(k) limits common law remedies to enforcement of the effluent lim-

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[32] Senator Muskie was the primary author of the Clean Water Act and his views are therefore entitled to particular weight. See, *e.g.*, *E.I. duPont deNemours & Co.* v. *Train*, *supra*, 430 U.S. at 129; *Simpson* v. *United States*, 435 U.S. 6, 13 (1978).

itations required by the Act.[33] Thus, petitioners cryptically suggest that "[s]ince compliance with [an NPDES] permit is specifically defined by Sec. 402(k) * * * as compliance with Sec. 505 * * *, and since common law actions are provided for in Sec. 505, it follows that [the terms of the permit] are the discharge limitations to which a discharger may be held under common law * * *" (Br. 55). This syllogism is seriously flawed in several respects.

First, petitioners ignore the plainly limited scope of Section 402(k). As the Court explained in *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 205 (1976), Section 402(k) merely provides that, for purposes of enforcement actions under Sections 309 and 505 of the Act, 33 U.S.C. (and Supp. II) 1319 and 1365, "a discharger in compliance with the terms and conditions of an NPDES permit is deemed to be in compliance with those sections of the [Act] on which the permit conditions are based." See 33 U.S.C. 1342(k).[34] Section 505 is not listed in Section 402(k) as one of the "sections of the [Act] on which the permit conditions are based." In view of the specific and exhaustive enumeration of statutory provisions covered by Section 402(k) (*i.e.*, Sections 301, 302, 306, 307 and 403, 33 U.S.C. (and Supp. II) 1311, 1312, 1316, 1317, and 1343), there is no basis for ignoring the express limitations set forth in Section 402(k). See, *e.g.*, *Lewis* v. *United States*, No. 78-1595 (Feb. 27, 1980), slip op. 7; *Andrus* v. *Allard*,

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[33] Petitioners' contention that Section 505 provides for common law actions contradicts petitioners' primary argument that federal common law suits would interfere with the congressional design inherent in the Clean Water Act. See Point C, *infra*. Indeed, petitioners' sole explanation of the language in Section 505(e) suggests that Congress purposefully created federal common law actions as part of the statutory scheme.

[34] The Court also recognized that compliance with the permit does not even constitute compliance with all provisions of the Act. See 426 U.S. at 205; 33 U.S.C. 1342(k) ("except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health"). See also *E. I. duPont deNemours & Co.* v. *Train*, *supra*, 430 U.S. at 138 n.28 ("The purpose of § 402(k) seems to be to insulate permit holders from changes in various [EPA] regulations during the period of a permit").

444 U.S. 51, 56 (1979); *Huddleston* v. *United States*, 415 U.S. 814, 822 (1974).

Furthermore, petitioners' argument is premised on an erroneous characterization of Section 505(e). That provision preserves rather than creates the federal common law of nuisance. In fact, as we have previously pointed out (Point A 1, *supra*), the federal common law regarding interstate pollution was well established by the time Congress enacted the Clean Water Act. Because federal common law suits are therefore not enforcement actions under Section 505 of the Act, Section 402(k) simply does not purport to address the limits and contours of the federal common law or any other requirement outside of the Act. Compare 33 U.S.C. 1371(a), (b) (dredge permits issued under Section 404 of the Act, 33 U.S.C. (Supp. II) 1344, generally satisfy requirements of Refuse Act, 33 U.S.C. 407, Rivers and Harbors Act of 1910, 33 U.S.C. 421, and Supervisory Harbors Act of 1888, 33 U.S.C. 441–451b).

Finally, the language and legislative history of the Act, as well as EPA's own regulations, show that "mere compliance with agency regulations is not sufficient in itself under the Act to exempt a [discharger] from common-law liability." *Nader* v. *Allegheny Airlines, Inc.*, *supra*, 426 U.S. at 308 n.19. Cf. *New Jersey* v. *City of New York*, 283 U.S. 473, 482–483 (1931); *Baltimore & Potomac R.R.* v. *Fifth Baptist Church*, 108 U.S. 317 (1883).[35] Thus, Sections 505(e) and 510 establish that, in addition to enforcing the terms of the Act, any interested person—including a state—may seek to enforce any other more stringent rights and remedies provided for by other statutes or common law. See 33 U.S.C. 1365(e), 1370. See also 33 U.S.C. (and Supp. II) 1251(b), 1311(b)(1)(C), and 1371. Likewise, the Senate report unequivocally states that

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[35] Although EPA's regulations "will not necessarily mark the outer bounds of the federal common law, they may provide useful guidelines in fashioning such rules of decision." *Illinois* v. *City of Milwaukee*, *supra*, 406 U.S. at 103 n.5. Here, for example, the court of appeals considered EPA's effluent limitations and regulations in affirming in part and reversing in part the remedial order of the district court (Pet. App. A–20 to A–48).

"[c]ompliance with requirements under this Act would not be a defense to a common law action * * *." S. Rep. No. 92-414, *supra*, at 81, reprinted at 2 Leg. Hist. 1499. See Senate Hearings, Pt. 1, at 672. Accordingly, conformance to the terms of an NPDES permit does not "[a]uthorize any injury to private property or invasion of other private rights, or any infringement of Federal, State, or local laws or regulations." 40 C.F.R. 122.11(d)(2).[36]

C. Preservation of the Federal Common Law of Nuisance Will Effectuate the Policies and Goals of the Clean Water Act

1. Notwithstanding the plain meaning of the Act and its unambiguous legislative history, petitioners repeatedly suggest that continued recognition of an independent federal common law of nuisance will interfere with the administration and enforcement of the Act. The short answer to this claim is that Congress expressly preserved common law rights and remedies as a supplement to the statutory scheme. But, even if we ignore the specific savings clause of the Act, it is apparent that a federal common law suit to abate the discharge of raw sewage into Lake Michigan furthers the general policies of the Clean Water Act.[37]

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[36] EPA's administrative interpretation of the Act is entitled to great weight. See, *e.g.*, *E. I. duPont deNemours & Co.* v. *Train*, *supra*, 430 U.S. at 134-135 & n.25; *Union Electric Co.* v. *EPA*, 427 U.S. 246, 256 (1976); *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 226-227 (1976); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 87 (1975).

[37] The legislative history of the Act shows that Congress was especially concerned about the discharge of raw sewage from sewer overflows and inadequate treatment plants (see, *e.g.*, 1 Leg. Hist. 96-97, 100-104, 115-116, 121, 128, 161-162, 165, 167, 184, 346-347, 385, 405, 426, 444, 479, 495, 572-574, 599-601, 769-770, 774-775, 862; 2 Leg. Hist. 1160-1161, 1215, 1228, 1246, 1253-1254, 1257, 1263, 1332, 1343, 1379, 1411-1412, 1423, 1458-1459), by the accelerated eutrophication of the Nation's lakes and ponds (see, *e.g.*, 1 Leg. Hist. 152, 347, 385-386, 430, 456-457, 461, 493-494, 500, 599, 644, 741; 2 Leg. Hist. 1155, 1337, 1340, 1462), and by the deteriorating quality of water in the Great Lakes (see, *e.g.*, 1 Leg. Hist. 498-500, 502-503, 504-506, 525, 571-572, 599-601, 747, 772-773; 2 Leg. Hist. 1194, 1279, 1333, 1336, 1339, 1408-1409, 1439). Accordingly, Section 101(a) broadly declares that it

Contrary to petitioners' assertions, application of the federal common law regarding interstate pollution will not in any way disrupt implementation or administration of the Act. Certainly, a conflict between the Act and the federal common law may not "be inferred merely from the comprehensive character of the federal [regulatory] provisions." *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405, 415 (1973). See *Nader* v. *Allegheny Airlines, Inc.*, *supra;* cf. *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973). And here, EPA has long concluded that federal common law is an essential supplement to the Clean Water Act, advancing rather than disrupting the goals and policies of the statute. See *Reserve Mining Co.* v. *EPA*, *supra*, 514 F.2d at 501; 40 C.F.R. 122.11(d). As the agency primarily responsible for administering and enforcing the Act, EPA's views on this point are entitled to substantial deference. See, *e.g.*, *Nader* v. *Allegheny Airlines, Inc.*, *supra*, 426 U.S. at 306–307; *E. I. duPont deNemours & Co.* v. *Train*, *supra*, 430 U.S. at 134–135 & n.25.

In any event, petitioners' allegations (Br. 33–46) about the potential friction between the Act and the federal common law of nuisance are without substance. We have already demonstrated that the "uniformity" of effluent limitations (*id.* at 37–43) contemplated by the Act is a *minimum* level of effluent control that may be exceeded by the requirements of other laws. See pages 7–8, 22, *supra;* 33 U.S.C. (and Supp. II) 1251(b), 1311(b)(1)(C), 1370, 1371; *Mianus River Preservation Comm.* v. *EPA*,

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is the objective of the Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and sets as a national goal "that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. 1251(a). The Act also sets as an interim goal the achievement by July 1, 1983, of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. 1251(a)(2). Finally, Section 101(b) makes clear that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution * * *." 33 U.S.C. (Supp. II) 1251(b).

541 F.2d 899, 906 (2d Cir. 1976). Petitioners also claim (Br. 45, 54–55) that the possibility of judgments under the common law will deter and delay the industrial and governmental planning and investments necessary to comply with the Act. But regardless of potential liability under other laws, dischargers must comply with the terms and deadlines of the Act.[38] Moreover, in applying common law nuisance principles the federal courts have means of tailoring the relief to the equities in each case.[39] See, *e.g.*, Comment, *Federal Common Law in Interstate Water Pollution Disputes*, 1973 U. Ill. L. F. 141, 151–159; Bryson & Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 Ecol. L. Q. 241, 264–275 (1972); *New Jersey* v. *City of New York*, *supra*, 283 U.S. at 483.[40]

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[38] Indeed, lack of federal funding does not excuse municipal noncompliance with the Act, although Congress modified the Act in 1977 to permit limited extensions where "the United States has failed to make financial assistance under this chapter available." 33 U.S.C. (Supp. II) 1311(i)(1). In no event may compliance be achieved later than July 1, 1983.

[39] As a general proposition, petitioners' fears that the federal courts will render belated or disproportionate remedial orders against municipalities or other dischargers under the federal common law are therefore unfounded. The United States did not participate in the extensive evidentiary proceedings in this case and it takes no position as to whether the courts below fashioned an appropriate remedy under the federal common law of nuisance in the circumstances presented here. We note that petitioners were aware of their potential liability under the common law before the Act was passed and were therefore able to take that possibility into account in planning their sewage treatment requirements.

Likewise, there is no conflict between the federal common law and Sections 212(2) and 217 of the Act, 33 U.S.C. (and Supp. II) 1292(2), 1297. See Pet. Br. 36–37. Those sections merely require that all federally-funded projects designed to meet the standards and requirements set in accordance with the Act are "the most cost efficient alternative." 33 U.S.C. 1292(2)(B).

[40] In adjudicating a federal common law claim, the district court must determine whether the defendant's activities constitute an actionable nuisance and must evaluate the choice of remedies in light of all the relevant factors, including the harmful impact and benefit, if any, of the discharger's conduct. See Comment, *supra*, 1973 U. Ill. L. F. at 151–159; Bryson & Macbeth, *supra*, 2 Ecol. L. Q. at 264–275. Because

2. Furthermore, as evidenced by the circumstances of this case, the federal common law continues to play a critical role in protecting the environment. In amending the Act in 1977, Congress expressly recognized that neither the Act nor EPA's regulations satisfactorily address the problem of combined storm and sanitary sewer overflows that underlies this suit.[41] See, *e.g.*, H.R. Conf. Rep. No. 95-830, 95th Cong., 1st Sess. 108 (1977), *reprinted in* 3 *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act*, 95th Cong., 2d Sess. 292 (Comm. Print 1978) (hereinafter "Cont. Leg. Hist."); S. Rep. No. 95-370, 95th Cong., 1st Sess. 81 (1977), *reprinted in* 4 Cont. Leg. Hist. 714. Accordingly, Congress directed the Administrator of EPA to prepare and submit "a report on the status of combined sewer overflows in municipal treatment works operations." Pub. L. No. 95-217, Section 70, 91 Stat. 1608, 33 U.S.C. (Supp. II) 1375(c).[42] Yet, until such time as Congress acts defini-

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the elements of a nuisance claim are matters particularly within the conventional experience of the federal courts (see *United Steelworkers* v. *United States*, 361 U.S. 39, 61-62 (1959) (Frankfurter and Harlan, J.J., concurring); *New Jersey* v. *City of New York*, *supra*; *Georgia* v. *Tennessee Copper Co.*, *supra*) and because adjudication of a nuisance claim does not involve setting national effluent limitations, evaluating industry-wide conditions, or other matters within the special expertise of EPA, the district courts are not required under the doctrine of primary jurisdiction to refer common law suits to the EPA in the first instance. See, *e.g.*, *Nader* v. *Allegheny Airlines*, *supra*, 426 U.S. at 303-307; *United States* v. *RCA*, 358 U.S. 334 (1959); *Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952). In fact, even under the Act, the courts adjudicate whether a discharger is in compliance with the terms of its permit. See 33 U.S.C. (and Supp. II) 1319, 1365. It would thus be highly anomalous if EPA, which does not even make administrative determinations regarding compliance with an NPDES permit, were required to determine whether particular discharges constitute a common law nuisance.

[41] Such overflows are not subject to the secondary treatment and best practicable waste treatment requirements applicable to publicly owned treatment works. See page 7, *supra*.

[42] This report was issued in October 1978. See EPA, *Report To Congress On Control of Combined Sewer Overflow In The United States* (1978).

tively, the federal common law may well be the only substantial source of protection against interstate pollution caused by combined sewer overflows.[43]

The federal common law regarding interstate water pollution supplements the federal environmental regulatory scheme in still other critical ways. For example, although EPA has established standards for secondary treatment, it does not specifically regulate a municipality's discharge of pathogens, fecal coliforms, and phosphorous—the very pollutants whose discharge is the basis for the remedial order in this case. Particularly where, as here, one state seeks to abate pollution emanating from another state, the federal common law may therefore be the only effective basis for relief.[44] Moreover, in those pollution disputes in which damages are more appropriate than injunctive relief (see, *e.g.*,

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[43] Petitioners erroneously suggest (Br. 34–35) that the Act supplies several different adequate remedies. In fact, however, Illinois has adopted more stringent pollution control standards regarding Lake Michigan than has Wisconsin, but is unable (under the Act) to compel Wisconsin to adopt similarly high standards. To be sure, the Act provides that a state whose waters are affected by discharges in another state may *recommend* that the other state adopt more stringent water quality standards or impose higher standards in particular permits. See 33 U.S.C. 1342(b)(3), 1342(b)(5), 1313(c). But neither the courts nor the Administrator are authorized to reject a permit or a state water quality standard that is in compliance with the terms of the Act and existing EPA regulations. See 33 U.S.C. (and Supp. II) 1313(c)(3), 1342(d)(2), 1369(b). The federal common law thus serves the critical functions of protecting the states' quasi-sovereign interests regarding the quality of its waters and also of abating the otherwise unregulated or underregulated pollution of interstate and navigable waters. See Comment, *Federal Common Law In Interstate Water Pollution Disputes*, 1973 U. Ill. L. F. 141, 159–160.

[44] Even where EPA has regulated a particular type of discharge, it has done so on a national basis. Without relief under the federal common law, a state or private person may be powerless to limit or abate interstate discharges that, although in compliance with EPA regulations, cause significant harm "in the context of localized situations." *Washington* v. *General Motors Corp.*, 406 U.S. 109, 116 (1972).

Harrisonville v. *W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 338–339 (1933); *Boomer* v. *Atlantic Cement Co., Inc.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.2d 312 (1970)), the federal common law alone can supply a suitable remedy since the Clean Water Act only provides for equitable relief and limited civil penalties. See Zener, *The Federal Law of Water Pollution Control, reprinted in* Environmental Law Institute, *Federal Environmental Law* 682, 790 (ed. Dolgin & Guilbert 1974). Cf. *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, 201–206 (1967). And both the states and the federal government have invoked the federal common law as a basis for remedying the discharge of toxic chemicals that occurred prior to the enactment of the Clean Water Act. See, *e.g.*, *Illinois* v. *Outboard Marine Corp.*, *supra; United States* v. *Solvents Recovery Service*, Civ. No. H 79–704 (D. Conn., filed Aug. 20, 1980); *United States* v. *Hooker Chemicals & Plastic Corp.*, No. 79–990 (W.D. N.Y., filed Dec. 20, 1979) (Love Canal litigation). In short, there is still a pressing need for the federal common law of nuisance regarding water pollution.

CONCLUSION

Insofar as the court of appeals held that the Clean Water Act does not preempt or limit the federal common law of nuisance, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 1980

☆ U.S. GOVERNMENT PRINTING OFFICE: 1980 326913 56